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IN THE

Supreme Court of the United States

October Term, 1970

No. 1062

FIELDS PRODUCTIONS, INC.,

Petitioner,

v.

UNITED ARTISTS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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December 4, 1970

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutory Provision Involved	3
United States Code, Title 15	3
Statement of the Case	3
Reasons for Granting the Writ	8
A. A conflict Between the Second and the Ninth Circuits Requires Resolution by this Court	8
B. The Decision in *Fields*, Unlike that in *Mulvey*, Is Inconsistent with the Decisions of This Court	13
Conclusion	20
Appendix:	
Opinion and Order, McLean, U.S.D.J., November 28, 1969	App. 1
Opinion and Order, McLean, U.S.D.J., January 12, 1970	App. 4
Opinion of the United States Court of Appeals for the Second Circuit	App. 5

TABLE OF AUTHORITIES

PAGE

Cases:

Billy Baxter, Inc. v. The Coca-Cola Co. and Canada Dry Corp., —— F.2d ——, CCH 1970 Trade Cases, p. 89,199, ¶73,307 (2d Cir. Aug. 25, 1970) 11, 12

Hart v. B. F. Keith Vaudeville Exchange, 262 U.S. 271 16

J. I. Case Co. v. Borak, 377 U.S. 426 17

Karseal Corporation v. Richfield Oil Corporation, 221 F.2d 358 (9th Cir.) 15

Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 14, 16

Mulvey v. Samuel Goldwyn Productions, —— F.2d ——, 1970 CCH Trade Cases, p. 89,448, ¶73,361 (9th Cir., Oct. 20, 1970) 8, 9, 10, 11

Pape Television Co. v. Associated Artists Pro. Corp., 277 F.2d 730, 279 F.2d 217 (5th Cir.) 20

Perkins v. Standard Oil Co., 395 U.S. 642 12

Perma Life Mufflers Inc. v. International Parts Corp., 392 U.S. 134 16, 17

Radiant Burners v. People's Gas L. & Coke Co., 364 U.S. 656 17

Rodovich v. National Football League, 352 U.S. 445 15, 17, 18, 20

SCM Corporation v. Radio Corporation of America, 276 F.Supp. 373 (S.D.N.Y.), 407 F.2d 166, 395 U.S. 943 15

Simpson v. Union Oil Co., 377 U.S. 13 15

United States v. Loew's, Incorporated, 371 U.S. 38 2

United States v. Paramount Pictures, Inc., 334 U.S. 131 13, 14

Statutes:

Clayton Act, §4, 15 U.S.C. §15 2

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Petitioner Fields Productions, Inc., plaintiff-appellant below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on September 8, 1970, which affirmed a judgment and order of the United States District Court for the Southern District of New York, dismissing the complaint as insufficient on its face on the ground that petitioner had no standing to bring a treble damage antitrust suit for injuries alleged to have resulted from respondent's block booking, a practice con-

deemed by this Court in *United States v. Loew's, Inc.*, *supra*, 371 U.S. 38, as a form of tying arrangement that violates Section 1 of the Sherman Act, 15 U.S.C. §1.

Opinions Below

The opinions of the Court of Appeals and of the District Court, which are not yet reported, appear in the Appendix.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on September 8, 1970. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Does the owner and producer of a better film have standing to maintain a treble damage antitrust action against the distributor of the film for damages alleged to have been caused by the distributor's block booking of the film?

2. Was it proper for the Courts below to have dismissed the complaint when it appears from the facts alleged that petitioner was injured "by reason of anything forbidden in the antitrust laws" (Clayton Act, Sec. 4, 15 U.S.C. §15)?

3. Was the denial of standing here inconsistent with prior decisions of this Court which give injured persons standing to sue under the antitrust laws?

Statutory Provision Involved

United States Code, Title 15:

§15. Suits by persons injured; amount of recovery.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Statement of the Case

In November, 1962 this Court, in *United States* v. *Loew's, Incorporated*, 371 U.S. 38, *supra*, found that block booking, the practice of respondent ("United Artists") and other distributors of motion pictures in conditioning the sale or licensing of motion pictures to television stations upon the purchase of one or more unwanted or inferior pictures, violated Section 1 of the Sherman Act, 15 U.S.C. §1, and prohibited the recurrence of such practices. In so doing, the Court recognized that one of the anti-competitive effects of block booking was to restrict the sale in the market place of better films, and to transfer the revenues that they would earn in the absence of block booking to less desirable films.

On January 16, 1968, petitioner ("Fields") filed its complaint against United Artists, alleging losses in revenues caused by United Artists' block booking in the tele-

vision market of "Happy Anniversary", a better picture produced and owned by Fields, and distributed by United Artists.

The District Court dismissed the complaint, holding, on the supposed authority of *Loew's, supra* (its reliance on this case will be shown to have been completely misplaced), that only television stations and other distributors of films for television exhibition had standing to sue for damages caused by a distributor's illegal block booking, and that Fields, as the owner of a better picture, lacked such standing to sue United Artists, the distributor of its picture. The Court of Appeals affirmed on the District Court's opinion.

The complaint* alleged that Fields, the independent producer and the owner of the copyright of the motion picture "Happy Anniversary", had entered into agreements in 1956 with United Artists, a major distributor of motion pictures, under which the latter assisted in financing the production of the picture and was given the exclusive right to distribute it to all media.

In 1964, shortly after it had been enjoined from further block booking in the distribution of films to television in *Loew's,*** *supra*, United Artists began to market "Happy Anniversary", a prime attraction not previously televised,

* The complaint is reproduced at pp. 4-14a and the supplemental amended complaint at pp. 69-81 of the Appendix filed with the Court below. Count II of the complaint, alleging a pendant claim for breach of contract, was withdrawn by Fields with United Artists' consent and was not passed upon by the District Court or the Court of Appeals.

** The final decree on remand from this Court was entered on January 24, 1963, United States District Court, Southern District of New York, Civil Action 119-288.

to television stations. Between 1964 and 1966, United Artists agreed to license the telecasting of "Happy Anniversary" to approximately 96 television stations, without the consent or prior knowledge of Fields. In each instance United Artists block booked "Happy Anniversary" with one or more of thirty-nine other pictures that were included in a package of forty pictures called "Showcase II," almost all of which were either of inferior quality or were not wanted by stations because of previous exposure on television. In no case was "Happy Anniversary" sold alone to any of the 96 stations. (Court of Appeals Appendix, pp. 6-7.)

It is alleged that United Artists employed the device of block booking in violation of the decree in *Loew's, supra*, for the purpose of restricting free competition in the market that existed for the sale of "Happy Anniversary", in order to obtain for itself excessive licensing fees for the inferior pictures at the expense of the revenues "Happy Anniversary" would have earned but for the illegal block booking (Court of Appeals Appendix, pp. 6, 76-7). United Artists was entitled to retain for itself nearly all of the proceeds derived from the higher pricing of the inferior films, while under its agreement with Fields, the latter was entitled to nearly all of the proceeds of the licensing of "Happy Anniversary".*

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* After deduction of its distribution fee (25%) and expenses, United Artists was entitled to retain the first $650,000 of the proceeds of "Happy Anniversary", Fields the next $300,000, anything above that to be divided 80% to Fields and 20% to United Artists. When United Artists began television distribution of the picture, it had already received its $650,000, from theatrical exhibitions, but Fields had not yet received any of the $300,000.

It appears that the stations which agreed to license the "Showcase II" package were located in only 96 of the approximately 240 United States markets in which a total of some 522 stations were located, as the lower Court found in *Loew's, supra.* 189 F. Supp. 373, 382 (1960). "Happy Anniversary" was not sold at all in well over 100 of these markets.

United Artists reported to Fields that it obtained a total sales price from the licensing of the "Showcase II" package of $4,616,432, from which it "allocated" $196,495 to "Happy Anniversary" (Court of Appeals Appendix, p. 63). On this basis, Fields alleged that it suffered a loss in revenues of at least $650,000, representing the fair value of "Happy Anniversary's" television rights, by reason of United Artists' purposeful block booking.

Prior to the filing of the complaint, United Artists had refused to permit Fields to examine the exhibition contracts under which "*Happy Anniversary*" was *licensed*, to disclose the prices which it offered and received for "Happy Anniversary" and to account to Fields for the amounts due from such sales (Court of Appeals Appendix, pp. 11-12).

Additional information, comprising only some of the contracts and correspondence relating to the alleged block booking and some of United Artists' internal memoranda dealing with the method of arriving at the licensing fee for each picture to be stated in the exhibition contracts, was obtained only after the complaint was filed, when Fields moved for the production of records. These records disclosed that,

in marketing "Happy Anniversary" to television stations, United Artists first fixed the price at which the entire package of pictures would be licensed, and then unilaterally and arbitrarily and without negotiating with the station, advised the station of the price of each picture to be stated in the contract. The price of each picture was not based on factors related to its desirability (age, artistic quality, acceptance by theatrical audiences, previous television exposure, etc.), but on the size of United Artists' interest in the picture. Further, it appeared that "Happy Anniversary" was block booked not only as part of "Showcase II", but with from twenty-five to over three hundred additional pictures, with aggregate additional licensing fees amounting to not less than $3,125,000 (Court of Appeals Appendix, pp. 64-66).

After the dismissal of the complaint, the District Court also denied Fields' motion, based upon a fuller legal and factual specification of United Artists' block booking made possible by the limited discovery just described, for an order vacating the judgment of dismissal or for leave to file a supplemental amended complaint.*

* Reproduced at pp. 69-81 of the Appendix filed in the Court of Appeals.

Reasons for Granting the Writ

A. A Conflict Between the Second and the Ninth Circuits Requires Resolution by this Court.

The District Court's decision, adopted and affirmed by the Court of Appeals, denied standing to Fields on the ground that, as the owner and producer of a better film, it could not have been injured by block booking engaged in by the film's distributor, United Artists. The Court held that only television stations or other distributors were in the "target area" of the alleged block booking and could be so injured. The Court also held that the damages resulting to Fields from United Artists' block booking were "incidental" rather than "direct", and that the "cause" of the alleged antitrust injury was that Fields "was not allocated a fair share of the total receipts from the block," which "may be a breach of contract, but it is not a violation of the antitrust laws".

Those same grounds were urged and unanimously rejected as "specious" by the Ninth Circuit on October 20, 1970 in *Mulvey* v. *Samuel Goldwyn Productions*, —— F. 2d ——, 1970 CCH Trade Cases p. 89,448, ¶73,361 (9th Cir. Oct. 20, 1970). In *Mulvey*, the Circuit Court reversed the dismissal by the District Court of a Sherman Act claim which was in all essential respects the same as that alleged by Fields. The plaintiff, Mulvey, had sold to the defendant's predecessor his interest in five motion pictures for a price to be determined by the net receipts generated by Goldwyn's distribution of the pictures. Mul-

vey was to receive 82½% of the net receipts generated by the films' distribution up to a maximum of $1,300,000. By reason of the block booking, Mulvey alleged, he received only $740,800, rather than an amount more nearly approximating the maximum. Fields was in precisely the same position as Mulvey, even though it remained the owner of "Happy Anniversary", for its revenues depended entirely upon receipts obtained by United Artists as its marketing agent.

In *Mulvey*, the Ninth Circuit held that the anticompetitive effects of block booking created injury to the owner of a better film, and that such an owner accordingly had standing to sue the block booker (CCH 1970 Trade Cases, p. 89,450):

> "Block booking enables a distributor to obtain greater revenue from less desirable films by forcing an exhibitor who desires other films to take the entire package. An exhibitor who refuses to accept the less desirable films will be denied the films of greater worth. Block booking thereby enhances the market value of those films of lesser intrinsic merit. If exhibitors refuse to accept the entire package, the revenue normally generated by the more desirable films will be substantially reduced.
>
> Goldwyn directed his activities at the means of distributing films in order to affect their individual revenue-producing potentials—the target area. Mulvey's films are within this target area. Consequently, it is entirely foreseeable that Goldwyn's block booking could impair the profit potential of Mulvey's films, thus depreciating the value of Mulvey's contractual interest in the films' revenue."

Fields urged in the Courts below that United Artists' block booking had the same anticompetitive effect in the

marketing of "Happy Anniversary" with the same injury to Fields, as were found in *Malvey, supra*. United Artists' block booking prevented television stations which refused to accept the less desirable films in the block from buying "Happy Anniversary" at all, as illustrated by the fact that "Happy Anniversary" was not sold to over 300 television stations located in over 100 of the approximately 240 markets which the District Court in *Loew's, supra*, found were available for the purchase of films for television. Fields also urged that the revenues of "Happy Anniversary" were substantially reduced in the 96 markets where it was sold only as part of a block because United Artists, a party in *Loew's, supra*, violated the *Loew's* decree which required it to "individually list, separately price, offer for sale and sell for television each motion picture", as alleged (Court of Appeals Appendix, p. 78). This was the gravamen of Fields' claim.

The Court below, however, was of the opinion that the more direct cause of Fields' injury was that it did not receive its "fair share of the total receipts from the block", which "may be a breach of contract" which "would seem to be plaintiff's proper remedy" in the State Court action then pending. But the breach of contract action contemplated by the Courts below could not have compensated Fields for those many instances where block booking prevented "Happy Anniversary" from being sold in over 100 markets, or where the proceeds of the block booking did not include additional revenues that "Happy Anniversary" would have generated had its distributor not violated the *Loew's* decree. In those cases there would be no proceeds to "allocate", "fairly" or otherwise.

More importantly, just as in *Mulvey*, the only wrong of which Fields complained was block booking. It is just as immaterial here that the block booking may also have constituted a breach of contract as it was in *Mulvey*, where the Court said (CCH 1970 Trade Cases, p. 89,449):

> "It is immaterial that block booking was or was not a breach of contract. Successful maintenance of an antitrust suit does not depend upon the availability or nonavailability of a common-law remedy for that wrong."

Thus, in *Mulvey* it was properly recognized that where damages are claimed to flow in part from an antitrust wrong and in part from a non-antitrust wrong, then, while damages from the antitrust wrong may be diminished accordingly, nevertheless the antitrust suit cannot be dismissed solely because the non-antitrust wrong may have contributed in part to the claimant's damages. For, as the Court in *Mulvey* recognized, where there are issues relating to the presence and relative weight of competing causes of damage (CCH 1970 Trade Cases, p. 89,450, footnote, Supreme Court citations omitted):

> "It would be a rare case indeed in which such questions could be resolved as a matter of law."

The conflict between Circuits as to the test by which standing is to be determined, now presented so sharply in the conflict between *Mulvey* and the present case, has been developing for some while. Judge Waterman, dissenting in *Billy Baxter, Inc.* v. *The Coca-Cola Co. and Canada Dry Corp.*, —— F.2d ——, CCH 1970 Trade Cases p. 89,199,

¶73,307 (2d Cir. Aug. 25, 1970),* reviewed its development at length, and pinpointed its causes (at pp. 89,205-89,206):

> "* * * in deciding whether a plaintiff has standing to pursue the federally created cause of action codified in 15 U.S.C. §15 it seems to me that perhaps the use by courts in antitrust opinions of inherited decisional labels may have obfuscated the positions of some plaintiffs so as to have denied them the recoveries which fact-analysis might have indicated they should have obtained."

The developing conflict described by Judge Waterman, involving a number of Circuits, but especially the Second and the Ninth, is now ripe for resolution by this Court. As yet, this Court has not yet had the occasion to pass on the propriety of the "target area" and "direct-incidental" test for standing, or to consider its relation to "the basic policy considerations that give the standing-to-sue requirement viability" (Judge Waterman, dissenting in *Billy Baxter, supra*, 1970 CCH Trade Cases, p. 89,206). In a single decision referring to the test, the Court rejected the result, however. Where the lower Court had found that the appellant, as the sole stockholder of his corporation, was "only *incidentally* injured by a violation * * *" as a "bystander who was hit but not aimed at, * * *", this Court said that he "* * * was no mere innocent bystander; he was the principal victim of the price discrimination practiced by Standard." *Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 649 (Emphasis by Court).

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* In *Billy Baxter*, cited by the Court below in support of its decision, the plaintiff, a franchisor of the right to bottle soft drinks, was not allowed to sue the defendant bottlers for injuries caused by their antitrust violations simply because it was not a bottler itself, and was thus injured, in the Court's view, only indirectly, through its franchised bottlers.

B. The Decision in *Fields*, Unlike that in *Mulvey*, Is Inconsistent with the Decisions of This Court.

It was held in the present case, on the express authority of *Loew's*, *supra*, that block booking did not injure Fields, the owner of a better film that was block booked, but only injures "television stations who are compelled to accept motion pictures that they do not want" and "other distributors who are deprived of an opportunity to license their pictures to television stations who have been forced to accept defendant's pictures". This view was rejected in *Mulvey*, *supra*, 1970 CCH Trade Cases at p. 89,450, and is contrary to this Court's decisions on block booking.

In *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, adopted by this Court in *Loew's*, see 371 U.S. at pp. 46-47, the fact that block booking stood to injure the owner of the copyright of the better, tying film was explicitly recognized. Thus, in analysing the economic effects of block booking, the Court said (334 U.S. at p. 158):

> "It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius. But the reward does not serve its public purpose if it is not related to the quality of the copyright. Where a high quality film greatly desired is licensed only if an inferior one is taken, the latter borrows quality from the former and strengthens its monopoly by drawing on the other. The practice tends to equalize rather than differentiate the reward for the individual copyrights. Even where all the films included in the package are of equal quality, the requirement that all be taken if one is desired increases the market for some. Each stands not on its own

> footing but in whole or in part on the appeal which another film may have."

Nor is there anything in *Loew's, supra*, which has changed the criteria for determining the adequacy of a complaint and those who are entitled to sue for treble damages set forth by this Court in *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 235:

> "These are whether the allegations disclose a restraint and monopolistic practices of the types outlawed by the Sherman Act; whether, if so, those acts are shown to produce the forbidden effects upon commerce; and whether the effects create injury for which the recovery of treble damages by the petitioners is authorized."

In *Mulvey* the Court tested the complaint by these criteria. Had the Court below done so, as urged by Fields, it would have found, on the authority of *Loew's* and *Paramount, supra*, that block booking as an anticompetitive device was likely to injure the owner of a better film, as was recognized in *Mulvey*.

Instead, the Courts below asked and answered whether Fields was a distributor of films to television or a television station, and not whether Fields was a victim of the forbidden practice, as required by decisions of this Court.

For, as stated in *Mandeville, supra*, the Sherman Act (334 U.S. at p. 236):

> "* * *does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. *Cf. United States* v. *Socony-*

> *Vacuum Oil Co.*, 310 U.S. 150; *American Tobacco Co.* v. *United States*, 328 U.S. 781. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."

In *Radovich* v. *National Football League*, 352 U.S. 445, 453-454, the Court said:

> "Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public."

See also *Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 649, *supra*, and *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 16. A construction of Section 4 of the Clayton Act, 15 U.S.C. §15, which would ignore the question whether plaintiff is a victim and read into the statute an arbitrary restriction on who may sue would be an unequal and thus unconstitutional application of the law. *Karseal Corporation* v. *Richfield Oil Corporation*, 221 F.2d 358, 365 (9th Cir. 1955).

It would seem from their reliance on *Billy Baxter*, *supra*, and *SCM Corporation* v. *Radio Corporation of America*, 276 F.Supp. 373 (S.D.N.Y. 1967), *aff'd* 407 F.2d 166 (2d Cir. 1969), *cert. den.* 395 U.S. 943, that the Courts below failed to recognize Fields as a victim of block booking because, for some reason not explained in the opinions, they felt that Fields was removed from the wrongdoer and was only injured derivatively as were the plaintiffs in those cases. But, in fact, no one stood between Fields, as the owner of the film, and United Artists, as Fields' marketing

agent for that film, so that Fields bore the full impact of United Artists' block booking, the sole means by which United Artists was to obtain greater revenues for its inferior films in which it had a greater stake, at the expense of Fields' revenues.

Moreover, if the Court below had followed the tests laid down by this Court in *Mandeville, supra*, and in numerous other decisions, it could not have dismissed the complaint at the pleading stage as a matter of law on the ground that Fields could not possibly have been injured at all by reason of the alleged block booking. In view of the causal allegations of the complaint and this Court's recognition in its block booking decisions that the device can injure the owner of a better film, it cannot be held that the complaint was "wholly frivolous" or that "nothing can be extracted from this bill that falls under the Act of Congress" (Holmes, J., in *Hart v. B. F. Keith Vaudeville Exchange*, 262 U.S. 271, 274). Furthermore, as this Court has made clear, Fields was not required in its treble damage complaint to exclude any cause other than block booking as contributing in some way to its injury. As was said in *Perma Life Mufflers Inc. v. International Parts Corp.*, 392 U.S. 134, 143-4:

> "Under §4, plaintiff must show not only that the defendant violated the antitrust laws but that his conduct caused the damages alleged in the complaint. Normally, it would be enough with respect to causation if the defendant 'materially contributed' to plaintiff's injury, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 702 (1962); or 'substantially contributed, notwithstanding other factors contributed also,' *Momand v. Universal Film Exchanges, Inc.*, 172 F. 2d 37, 43 (C.A. 1st Cir. 1948), *cert. denied*, 336 U.S.

967 (1949). The plaintiff need not show that the illegality was a more substantial cause than any other. *Haverhill Gazette Co.* v. *Union Leader Corp.*, 333 F. 2d 798, 805-806 (C.A. 1st Cir.), *cert. denied*, 379 U.S. 931 (1964)."

The complaint here completely satisfied this Court's rule stated in *Radiant Burners* v. *People's Gas L. & Coke Co.*, 364 U.S. 656, 660:

> "* * * to state a claim upon which relief can be granted under that section [Section 1 of the Sherman Act, 15 U.S.C. §1], allegations adequate to show a violation, and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires."

The questions of causation presented here are questions of fact to be resolved at trial, "after all the facts are in", *Radovich* v. *National Football League*, *supra*, 352 U.S. at p. 454. See also *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 431.

Lastly, to deprive the owner of a better film of standing to sue his distributor for damages caused by block booking conflicts with the Congressional purpose of Section 4 of the Clayton Act, 15 U.S.C. §15, as found by this Court, which said in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, *supra*, 392 U.S. 134, 139:

> "* * * that the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws."

Here, the anticompetitive devices charged were practiced in violation not only of the clearest possible pronouncements of this Court but of a decree binding on the wrongdoer himself. The decree in *Loew's* (January 24, 1963, United States

District Court, Southern District of New York, Civil Action 119-288), which closely followed this Court's opinion, 371 U.S. at pp. 53-54, by its terms prevents these evils, and affords the independent producer the protection he needs. It not only prohibited United Artists from block booking in general terms but from:

> "Selling or licensing, or offering to sell or license, the right to exhibit feature films over television stations, except in the following manner: (1) each picture offered or sold shall be individually listed, separately priced and offered or sold picture-by-picture, without discrimination in price or terms or conditions of sale between competing stations; and (2) defendant shall sell or license such film or films as a station may seek to purchase or license at the defendant's offered prices, subject however to the proviso [relating to then pending negotiations] contained in paragraph IV (A) hereof."

But the action of the Courts below has nullified the decree and this Court's decisions prohibiting block booking as far as the independent producer is concerned. By denying the latter access to the Federal Courts, the Courts below have disregarded the controlling decisions of this Court summed up in *Radovich* v. *National Football League*, *supra*, 352 U. S. at pp. 453-454:

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade', *Times-Picayune Publishing Co.* v. *United States*, 345 US 594 (1953), and meet the requirement that petitioner has thereby suffered injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws

protect the victims of the forbidden practices as well as the public. *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.* 334 US 219, 236 (1948). Furthermore, Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of §5 of the Clayton Act. *Emich Motors Corp.* v. *General Motors Corp.* 340 US 558 (1951). In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."

The independent producer, who does not have his own nation-wide distribution system as United Artists and the other majors do, is a principal victim of block booking. He is forced to use a major distributor as his marketing agent because, without the latter's organization, his picture will not have access to the market at all. If the distributor can block book with impunity, using the independent producer's better picture as a tying product, then his access to the market is only illusory, for his picture cannot receive the reward due to its merits which it would receive in a free market.

Allowing only competing distributors and television stations standing affords no redress at all to a victimized independent producer, and may be of little value to enforcement in general, as well. Competing distributors, many of whom were found guilty of block booking together with United Artists in *Loew's, supra,* do have free access to the market. Television stations, compelled to buy a certain amount of fungible programming material in any event, could not care less whether they buy inferior film from one block booker rather than another in order to get the scarcer commodity, the prime attractions offered by the better pic-

tures. (Research discloses only one case of a television station suing a distributor for block booking, *Pape Television Co. v. Associated Artists Pro. Corp.*, 277 F.2d 750 (5th Cir. 1960), *reh. den.* 279 F.2d 217 (5th Cir. 1960), and none by one distributor against another.)

Entirely apart from the injustice such a situation works on the individual producer who has fallen victim to a distributor's block booking, if stations and distributors do not choose to sue, and producers are arbitrarily denied access to Court, enforcement in the Second Circuit of the *Loew's* decree by way of private action may become non-existent, thus "seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement", *Perma Life, supra*, 392 U.S. at p. 139.

It is respectfully submitted that, in the circumstances of the present case, Fields, as was said in *Radovich, supra*, 352 U.S. at p. 454, "is entitled to an opportunity to prove his charges."

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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December 4, 1970

Appendix

Opinion and Order, McLean, U.S.D.J., November 28, 1969

Defendant moves for judgment on the pleadings dismissing this private treble damage antitrust action. The question is whether plaintiff has standing to sue.

The complaint, which is deemed to be true for the purposes of this motion, can be briefly summarized. In September 1956, defendant agreed to finance and distribute a motion picture produced by plaintiff. The agreement provided in substance that defendant would not "block book" the picture, *i.e.*, it would not require an exhibitor, as a condition of obtaining a license to exhibit plaintiff's picture, to agree to accept a license for other pictures distributed by defendant. In breach of this agreement, defendant did block book plaintiff's picture in licensing it for exhibition on television. Defendant received $4,616,432 from licensing a block of forty pictures, including plaintiff's. Defendant "arbitrarily allocated" to plaintiff's picture the sum of $196,495 as its share of the total. This sum was at least $400,000 less than the fair value of the television rights in plaintiff's picture. Defendant's block booking violated the antitrust laws and also contravened a decree entered by this court against defendant in 1963 in a government antitrust suit, *United States* v. *United Artists Corporation*, Civil Action No. 119-288. By reason of defendant's unlawful conduct, plaintiff has been damaged in the sum of at least $400,000, which is to be trebled, so that plaintiff is entitled to recover $1,200,000 plus costs and attorney's fees.

I wrote at some length on the subject of standing to sue in private treble damage actions in *SCM Corporation* v.

Radio Corporation of America, 276 F. Supp. 373 (S.D.N.Y. 1967), *aff'd* 407 F.2d 166 (2d Cir. 1969), *cert. denied*, 395 U.S. 943 (1969). It is unnecessary to repeat all that I said there. In essence, the principle is that in order to have standing to sue for damages sustained "by reason of" defendant's violation, the injury which plaintiff suffered must have been direct rather than incidental. Plaintiff must have been in the "target area" of the violation.

It is clear that the block booking of motion pictures for exhibition on television contravenes Section 1 of the Sherman Act.

> *United States* v. *Loew's Incorporated*, 371 U.S. 38 (1962)
>
> *See also United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948)

Block booking is a form of tying agreement. The reason that a tying agreement violate Section 1 is that it injures buyers and competitors of the seller. As applied to licensing motion pictures, this means that the block booking injures the television stations who are compelled to accept motion pictures that they do not want and it also injures other distributors who are deprived of an opportunity to license their pictures to television stations who have been forced to accept defendant's pictures.

> *United States* v. *Loew's Incorporated*, 371 U.S. at 45

It is thus the television stations and the other distributors who are in the "target area". If the block booking in fact causes any injury to the producer of the pictures which are thus block booked, that injury is only incidental.

Moreover, in this case it is difficult to see how the block booking could have caused injury to plaintiff, incidental or not. Plaintiff's grievance seems to be that it was not allocated a fair share of the total receipts from the block. The cause of plaintiff's damage, therefore, was the improper allocation, not the block booking. This may be a breach of contract, but it is not a violation of the antitrust laws. Plaintiff is already suing defendant for breach of contract, initially in this court and now in the state court. That would seem to be plaintiff's proper remedy. I can see no justification for trebling any damages to which plaintiff may be entitled.

Defendant's motion is granted.

So ordered.

Dated: November 28, 1969

s/ Edward C. McLean
U.S.D.J.

Opinion and Order, McLean, U.S.D.J., January 12, 1970

In its proposed "supplemental amended complaint", plaintiff has introduced various allegations in an effort to make it appear that plaintiff is a competitor of defendant and hence that plaintiff has suffered a direct injury from defendant's alleged block booking. In my opinion, plaintiff and defendant are not competitors within the meaning of the rule of *United States* v. *Loew's Incorporated*, 371 U.S. 38, 45 (1962). Plaintiff and defendant are not competing distributors of motion pictures. The fundamental fact continues to be, despite the added verbiage, that plaintiff granted to defendant the exclusive right to distribute plaintiff's picture and that what plaintiff is really complaining about is that defendant did not pay plaintiff its fair share of the proceeds of that distribution. The proposed new allegations are not sufficient to transform a claim for breach of contract into a treble damage antitrust action.

Motion denied. So ordered.

Dated: January 12, 1970

s/ Edward C. McLean
U.S.D.J.

Opinion of United States Court of Appeals For the Second Circuit

No. 739—September Term, 1969.

(Argued June 15, 1970 Decided September 8, 1970.)

Docket No. 34539

FIELDS PRODUCTIONS, INC.,
Plaintiff-Appellant,

v.

UNITED ARTISTS CORPORATION,
Defendant-Appellee.

Before:

ANDERSON and FEINBERG, *Circuit Judges*, and MANSFIELD, *District Judge.**

Appeal from an order dismissing for lack of standing a private treble damage antitrust suit in the United States District Court, Southern District of New York, Edward C. McLean, *Judge*. Affirmed.

HERMAN ODELL, Esq., New York, N. Y. *for Plaintiff-Appellant.*

PAUL MARTINSON, Esq., New York, N. Y. (Phillips, Nizer, Benjamin, Krim & Ballon and David G. Miller, Esq., New York, New York, on the brief), *for Defendant-Appellee.*

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* Of the Southern District of New York, sitting by designation.

PER CURIAM:

The judgment of the District Court is affirmed on the opinion of Judge McLean filed on May 27, 1969, Docket No. 68 Civil 198. See also *Billy Baxter, Inc.* v. *The Coca-Cola Co. and Canada Dry Corp.*, —— F.2d —— (2 Cir. August 25, 1970).

FEB 3 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1062

FIELDS PRODUCTIONS, INC.,

Petitioner,

—against—

UNITED ARTISTS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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INDEX

PAGE

Question Presented 1

Statement of the Case 2

Reasons for Denial of the Writ 4

A. Here the grievance is based entirely upon respondent's alleged underpayment to petitioner of the Picture's fair share of the total television receipts (or its fair television value), in breach of the contract, and is not even indirectly based upon any antitrust violation 5

B. The decision below clearly follows the criteria of the decisions of this Court, and in no respect does it "conflict" with any of them 9

C. This Court has uniformly denied certiorari in antitrust "standing" and other cases, despite the existence of "conflicts" between Circuits similar to, more important, and more likely to recur, than the conflict asserted here 13

D. The decision below is manifestly correct, and is supported by consistent, overwhelming authority 19

Conclusion 20

PAGE

Table of Authorities

Cases:

Arlington v. Mayer, *cert. den.*, 339 U.S. 965 (1950) (no lower court opinion) 18

Beal v. United States, 182 F.2d 565 (6th Cir.), *cert. den.*, 340 U.S. 852 (1950) 18

Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2nd Cir. 1970) 4

Bookout v. Schine Chain Theatres, Inc., 253 F.2d 292 (2nd Cir. 1958) 19

Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51 (9th Cir.), *cert. den.*, 342 U.S. 919 (1952) ..10, 14, 15, 18

Coplon v. United States, 191 F.2d 749 (D.C. Cir.), *cert. den.*, 342 U.S. 926 (1952) 18

Delaware v. Curran, 259 F.2d 707 (3d Cir.), *cert. den.*, 358 U.S. 948 (1958) 18

Federal Trade Commission v. Sinclair Ref. Co., 261 U.S. 464 (1922) 11

Ferraiolo v. Newman, 259 F.2d 342 (6th Cir.), *cert. den.*, 359 U.S. 927 (1959) 18

Gerli v. Silk Ass'n of America, 36 F.2d 959 (S.D.N.Y. 1929) 19

Harrison v. Paramount Pictures, Inc., 211 F.2d 405 (3rd Cir.), *cert. den.*, 348 U.S. 828 (1954) 14, 16

PAGE

Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955) 16

Lieberthal v. North County Lanes, Inc., 221 F. Supp. 685 (S.D.N.Y.), *aff'd*, 332 F.2d 269 (2nd Cir. 1964) .. 19
Loeb v. Eastman Kodak Co., 183 Fed. 704 (3rd Cir. 1910) 19

Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948) 12
Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518 (3rd Cir.), *cert. den.*, 352 U.S. 890 (1956) 14, 15, 16
Miley v. John Hancock Mutual Life Insurance Co., 148 F. Supp. 299 (D. Mass.), *aff'd* 242 F.2d 758 (1st Cir.), *cert. den.*, 355 U.S. 828 (1957) 19
Missouri Pac. R.R. v. H. Rouw Co., 258 F.2d 445 (5th Cir.), *cert. den.*, 358 U.S. 929 (1959) 18
Mulvey v. Samuel Goldwyn Productions, 5 Trade Reg. Ref. (1970 Trade Cas.), ¶73,361, 89,448 (9th Cir. October 20, 1970) 13, 14, 16

Nationwide Auto Appraiser Serv. Inc. v. Association of Casualty and Surety Companies, 382 F.2d 925 (10th Cir. 1967) 20
NLRB v. Sanson Hosiery Mills, 195 F.2d 350 (5th Cir. 1950), *cert. den.*, 344 U.S. 863 (1952) 18
NLRB v. Southern Bleachery & Print Works, Inc., 257 F.2d 235 (4th Cir.), *cert. den.*, 359 U.S. 911 (1959) 18

Perkins v. Standard Oil of Calif., 395 U.S. 642 (1969) ..12, 17
Perma Life Mufflers, Inc. v. International Parts, Inc., 392 U.S. 134 (1968) 12

PAGE

Productive Inventions, Inc. v. Trico Products Corp., 224 F.2d 678 (2nd Cir.), *cert. den.*, 350 U.S. 936 (1956) 16

Radovich v. National Football League, 352 U.S. 445 (1957) 12

Salerno v. American League of Professional Baseball Clubs, 429 F.2d 1003 (2d Cir. 1970) 19

SCM Corporation v. Radio Corporation of America, 276 F. Supp. 373 (S.D.N.Y.), *aff'd*, 407 F.2d 166 (2nd Cir.), cert. den., 395 U.S. 943 (1969) 12, 13, 14, 16, 17

Seven-Up Co. v. Blue Note, Inc., 260 F.2d 584 (7th Cir.), *cert. den.*, 359 U.S. 966 (1959) 18

Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907 (D. Mass. 1956) 15, 20

Sokol Bros. Furniture Co. v. Commissioner of Internal Revenue, 185 F.2d 677 (5th Cir.), *cert. den.*, 340 U.S. 952 (1951) 18

Tyrrell v. District of Columbia, 243 U.S. 1 (1916) 7

Volasco Products Co. v. Lloyd A. Frey Roofing Co., 308 F.2d 383 (6th Cir.), *cert. den.*, 372 U.S. 907 (1963) 16

VTR, Inc. v. Goodyear Tire & Rubber Co., 303 F. Supp. 773 (S.D.N.Y. 1969) 19

United States v. Abrams, 197 F.2d 803 (6th Cir.), *cert. den.*, 344 U.S. 855 (1952) 18

United States v. Community Services, Inc., 189 F.2d 421 (4th Cir.), *cert. den.*, 342 U.S. 932 (1952) 18

PAGE

United States v. Loew's, Inc., 371 U.S. 38 (1962) 9, 10, 11, 14

United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948) 5, 9, 11

Zipp v. Commissioner, 259 F.2d 119 (6th Cir.), *cert. den.*, 359 U.S. 934 (1959) 18

Other Authority:

Turner, *The Validity of Tying Arrangements Under the Anti-Trust Laws*, 72 Harv. L. Rev. 50 (1958) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1062

FIELDS PRODUCTIONS, INC.,

Petitioner,

—against—

UNITED ARTISTS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, United Artists Corporation, respectfully submits this brief in opposition to the petition of Fields Productions, Inc. for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review its judgment entered September 8, 1970, unanimously affirming two District Court decisions dismissing the petitioner's complaint.

Question Presented

The only question actually presented is as follows:

Petitioner was the producer of a single motion picture, is not and never has been engaged in either the business of film distribution or the ownership or operation of a

television station, and voluntarily granted to respondent the exclusive license to distribute said picture, retaining only a percentage interest in the receipts therefrom. May said petitioner maintain an antitrust treble damage action against the distributor, alleging the distributor's block booking of said film to its own television station customers, but claiming damages attributable to the distributor's alleged breach of its license agreement with petitioner, and not to the alleged block booking?

Statement of the Case

The relevant facts are not in dispute. Petitioner ("Fields") is a corporation engaged exclusively in the business of producing motion pictures—a total of three during its entire existence—and in no sense a customer or competitor of respondent distributor ("United Artists"). In 1956, Fields entered into a written agreement with United Artists, giving it the exclusive right to distribute, both theatrically and on television, a motion picture produced by Fields entitled "Happy Anniversary" ("the Picture") (App., 31-33).*

Pursuant to said agreement, Fields was to receive a percentage of the revenue realized from United Artists' distribution of the Picture. United Artists agreed to use its best efforts in such distribution (*id.* at 33 *et seq.*). The Picture was distributed exclusively by United Artists until December 1966, when United Artists' distribution rights expired. No claim has been made with respect to United Artists' distribution of the Picture in theatres. Fields'

* Appendix references, unless otherwise noted, are to the Appendix in the Court of Appeals.

percentage interest (virtually a royalty) in said potential television distribution receipts, represents therefore, the entire subject matter of its claim.

In approximately January 1964, United Artists began to enter into licensing agreements with various television stations for showing the Picture in that medium. During the brief period before United Artists' exclusive distribution rights expired (Fields having refused to extend said rights), the Picture received in excess of $213,000 as its share of the proceeds realized from television distribution (App., 28).

Fields complains that United Artists, in its television distribution of the Picture, engaged in the practice of "block booking" by "condition[ing] the license of the Picture [to television stations] upon the acceptance by each station of a package or block of one or more of 39 other pictures . . ." (App. 7; sought, in the "proposed supplemental complaint" at 72, to be increased in number). It is further alleged that United Artists realized from the distribution to television stations of the Picture together with the films with which the Picture was allegedly block booked, *in toto*, the sum of $4,616,432 (App., 8) or, as "supplemented," $7,741,000 (App., 75-76).

Fields brought this action contending that by reason of such block booking it has been deprived of "a substantial portion of the economic value of the Picture" (App., 12, 79). It claims that United Artists "arbitrarily allocated" to the Picture a sum which was $400,000 less than it should have been (App., 9).

United Artists moved to dismiss the complaint herein, and District Judge McLean granted that motion on two grounds: (1) that Fields lacked standing to sue because

he was not within the "target area" of the block booking proscription, under established law, and (2) that the injury claimed by Fields was not caused by the alleged block booking—even "incidentally"—but by United Artists' allegedly improper allocation of its television receipts, or breach of its contract with Fields (App. 1-3 of Petition). The Court of Appeals unanimously affirmed the District Court's judgment on the opinion below (Petition App. 6), citing, as additional authority, its most recent decision of *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183 (2nd Cir. 1970).

Even before the respondent moved to dismiss the complaint, petitioner impliedly recognized the weakness of its complaint. Thus, as stated in the petition (p. 4, ftn.) it voluntarily withdrew "Count II" of the complaint (which was based solely and frankly on the breach of contract)—because it feared that its antitrust count would be dismissed and knew that there was no independent jurisdiction of the contract count. Indeed, previously thereto, Fields instituted a separate action in the New York Supreme Court for said breach of contract; its complaint (like its former "Count II") alleges the same acts as are here alleged, but without seeking treble damages. That action represents, as the courts below held, Fields' actual and sole grievance.

Reasons for Denial of the Writ

Of all of the numerous antitrust complaints which have been dismissed for lack of standing to sue, and in which petitions for certiorari were filed alleging conflicts between Circuits—all of which were denied—the instant complaint

is legally the least tenable and the instant petition the least meritorious.

A. Here the grievance is based entirely upon respondent's alleged underpayment to petitioner of the Picture's fair share of the total television receipts (or its fair television value), in breach of the contract, and is not even indirectly based upon any antitrust violation.

As the District Court cogently held:

> "Moreover, in this case it is difficult to see how the block-booking could have caused injury to plaintiff, incidental or not. Plaintiff's grievance seems to be that it was not allocated a fair share of the total receipts from the block. The cause of plaintiff's damage, therefore, was the improper allocation, not the block booking. This may be a breach of contract, but it is not a violation of the antitrust laws. Plaintiff is already suing defendant for breach of contract, initially in this court and now in the state court. That would seem to be plaintiff's proper remedy. I can see no justification for trebling any damages to which plaintiff may be entitled." (Petition, App. 3; see also App. 4.)

Block booking and under-allocation or underpayment are clearly distinct and different from one another—in time, nature and concept. Even if both existed, the damages for the contractual underpayment cannot be trebled because of the block booking.

It is elementary that "block booking" means, simply, the conditioning of the licensing of one film upon the licensee's acceptance of another or other films, not merely the licensing of pictures "in blocks or groups" (*United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 159—1948), which

is virtually always done in television (see Petition, p. 19). As will be shown, the coercion or impact of such conditioning is upon the television stations (the licensees), or upon competing distributors who are thereby excluded from the television market—certainly not upon the producer, who shares in any revenues derived from such block booking. Manifestly, the same under-allocation as is here charged could have been effected without any conditioning or coercion against the television stations. In that event Fields would have precisely the same grievance as he now asserts for breach of contract for the deficit.

Conversely, if United Artists had block booked, but had credited Fields' picture with its full alleged fair value—which is in no way inconsistent—Fields would have no grievance at all. Thus, if Fields had been paid a sufficient portion of the $4,616,432 admittedly received for the entire package of forty films of which its Picture was a part, it would have no grievance even though the Picture had been blocked booked to United Artists' customers. Fields' own grossly exaggerated estimate values the television rights in the Picture at $400,000 more than actually allocated (App., 9).* But this claimed damage, it is clear, must be sought by way of the pending contract action, and not an antitrust suit.** Fields suffered no injury as far as the antitrust laws are concerned.

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* During its deposition plaintiff's president conceded that this $400,000 figure was "my opinion." When asked for the basis of this "opinion", he replied: "None whatsoever. It is my opinion." (App., 29).

** As Professor George Stigler, in an economic analysis appearing in 1963 Supreme Court Review at page 152, demonstrates, the effect of block booking is "to extract larger sums than otherwise would be possible from television stations." Hence, any damage to Fields, which received a percentage of such sums, could have been caused only by the misallocation of those "larger sums."

To said $400,000, the "proposed supplemental amended complaint" adds $250,000 for United Artists' alleged failure to "offer the Picture for a simultaneous network television exhibition" (as distinguished from its syndication among individual stations) (App., 73). This charge clearly has no relation whatsoever to any alleged "block booking" with other pictures.

In this case, therefore, the grounds of dismissal for lack of standing transcend those which have consistently been applied by the Courts (*infra*, C. and D.). They are not predicated merely upon the existence of an intermediate or other person who is directly damaged—or, *a fortiori*, upon differences in the "level" of distribution. Fields has completely misstated the nature of its cause of action, in an unwarranted attempt to treble its alleged damages. Indeed, the contractual nature of Fields' grievance is substantiated by the very language of its complaint (*e.g.*, pars. 5, 6, 7, 12, 13, 22; App., 5-9, 12)—on which Fields has artificially superimposed its claim for treble damages under the statute. These allegations relate primarily to United Artists' obligations under the contract, and to the manner and the alleged purpose of its allocation of the Picture's television receipts.

Fields' afterthought that, in addition to the alleged misallocation of receipts, Fields was precluded from certain television markets, is baseless and irrelevant, for at least four reasons:

(1) It is wholly outside the record, and cannot even be considered. See, e.g., *Tyrrell* v. *District of Columbia*, 243 U.S. 1 (1916). The complaint predicates Fields' damages *solely* upon the alleged improper or "arbitrary allocation" and block booking to the "ninety-six tele-

vision stations" to which the Picture *was* licensed (App. 9, 11); even when Fields constructed a "Proposed Supplemental Amended Complaint," for the purpose of distinguishing or circumventing the District Court's opinion, it did not (and logically could not) allege any preclusion from any stations by reason of the block booking. Indeed, it complained that "defendant entered into distribution contracts with *not less than 96* television stations located in over 30 different States," and that defendant block booked to those stations. (Emphasis added.)

(2) Even if Fields' flimsy rationalization had been pleaded, it postulates, essentially, only another consequence of the breach of the same provision of the distribution contract, which requires the distributor to use its best efforts to produce revenue, rather than an antitrust violation directed against the producer.

(3) It is innately preposterous—and contrary to the entire tenor of the complaint—that United Artists would thus have deprived itself of revenues. Fields, when it drew its complaint, was well aware that the other stations were simply not available for the picture, either because they were in competition with the 96 stations to which it was sold or for other reasons—so that Fields never, prior to its appeal, had the temerity to make such a contention.

(4) The contention is squarely contradicted by the petitioner's other argument (p. 19) that television stations require large quantities of motion pictures as "fungible programming material" and "could not care less" from whom they buy this material, in order to get the better picture. Concededly, therefore, the stations were not deterred by the tying in of the rest of the package, and there thus could have been no exclusion of Fields' picture from the television market as a result thereof.

Indeed, this last quoted assertion stultifies Fields' entire claim of block booking. If, as Fields contends, the television stations needed and were willing to accept said "programming material," they obviously were not coerced into buying it and, therefore (under *United States* v. *Paramount Pictures, Inc., supra,* at 159), there was no such forcing or conditioning as is requisite to block booking.*

B. The decision below clearly follows the criteria of the decisions of this Court, and in no respect does it "conflict" with any of them.

As the petition (p. 3) acknowledges, the prohibition of block booking of motion pictures to television stations by "conditioning" their sale upon the purchase of other pictures was enunciated and defined by this Court in *United States* v. *Loew's Inc.*, 371 U.S. 38 (1962). In defining the purpose and scope of that prohibition, the Court clearly set forth the "two reasons" why block booking is violative of the antitrust laws:

> "[Tying arrangements] are an object of antitrust concern for two reasons—*they may force buyers into giving up the purchase of substitutes for the tied product,* see Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 605, 97 L.ed. 1277, 1288, 73 S. Ct. 872, *and they may destroy the free access of competing suppliers of the tied product to the consuming market,* see International Salt Co. v. United States, 331 U.S. 392, 396, 92 L.ed. 20, 26, 68 S. Ct. 12. A tie-in contract may have one or both of these undesirable

* The speciousness of this entire action is further confirmed by Fields' admission, on its deposition herein (App. 28) that it had "no information" that block booking took place other than the fact that defendant sold pictures "in groups"—which, as above indicated, is entirely proper.

> effects when the seller, by virtue of his position in the market for the tying product, has economic leverage sufficient to induce his customers to take the tied product along with the tying item." (Emphasis added) (371 U.S. at 44-45).

Thus, as District Judge McLean held (Petition App. 2), in block booking for television there are two classes of persons within the "target area": (1) the television stations which, in the language of the *Loew's* decision, are forced to give up the freedom to purchase other films, and (2) the competing suppliers of the tied product, *i.e.*, other distributors of pictures to television stations, who are denied a market because the buyer has been forced to take said tied product from another seller. Clearly then, only the television stations and competing distributors of pictures for television can be directly affected by a distributor's tie-in sales, and have the "legitimate interests" that the Courts have sought to protect in the tie-in cases. See also Turner, *The Validity of Tying Arrangements Under the Anti-Trust Laws*, 72 Harv. L. Rev. 50, 60 (1958).

Fields, concededly, falls within neither of these categories.

Furthermore, Fields expressly surrendered the exclusive right to distribute its Picture to United Artists and retained nothing more than a contractual share in the proceeds derived from the distribution of the Picture. There can be no doubt, therefore, that Fields is in no position to claim antitrust injury, and is patently seeking "the windfall of treble damages." *Conference of Studio Unions* v. *Loew's, Inc.*, 193 F.2d 51, 54-55 (9th Cir.), *cert. den.*, 342 U.S. 919 (1952).

In addition, it was held in *United States* v. *Loew's, Inc., supra*, p. 9, that the evil sought to be proscribed is a restraint of "free competition in the market for the tied product" (p. 45). Obviously, Fields was not in the market for said "tied product"—*i.e.*, the pictures which he claims (equivocally, as aforesaid) that the television stations were forced to buy—nor did he compete with them, since he was not a distributor of other films which might have been licensed in lieu thereof. Petitioner's statement (p. 3) that in *Loew's* this Court "recognized that one of the anti-competitive effects of block booking was to restrict the sale * * * of better films" is a figment of petitioner's imagination.

In *United States* v. *Paramount Pictures, Inc., supra*, from which the petitioner (pp. 13-14) quotes out of context, this Court stated (at 157), "that block booking 'adds to the monopoly of a single copyrighted picture that of another copyrighted picture which must be taken' therewith." Clearly, the injury contemplated is that to the coerced purchaser of the tied picture, and not to the owner of the tying film, whose monopoly has been "add[ed] to."

In the language of this Court in another case: "the suggestion that the assailed practice [a tying arrangement] is unfair because of its affect upon the sale of [tying products] by their makers is sterile and requires no serious discussion." *Federal Trade Commission* v. *Sinclair Ref. Co.*, 261 U.S. 464 (1922). This implied limitation of the block booking cases is strongly fortified in the instant case, where, as above demonstrated, any injury allegedly suffered could have resulted only from a breach of contract, and not from the block booking at all.

The very decisions cited by the petitioner confirm the bankruptcy of its argument. Thus, the only conceivable relevance of *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948) (Petition, pp. 14, 16) is in its enunciation of the unquestioned proposition that a seller, as well as a purchaser, can sue for an antitrust violation which was directed against him. In *Radovich* v. *National Football League*, 352 U.S. 445 (1957), the plaintiff, a professional football player, allegedly blacklisted by defendants so as to prevent his employment in organized professional football, was obviously the direct target of the antitrust violations charged.

Perma Life Mufflers, Inc. v. *International Parts, Inc.*, 392 U.S. 134 (1968) (Petition, pp. 16-17), relating to the effectiveness of a defense of *pari delicto*, has not the slightest relevance to the questions of target area and causation here involved. As the Court of Appeals, Second Circuit, held in *SCM Corp.* v. *Radio Corp. of America*, 407 F.2d 166, 171 (2nd Cir.), *cert. den.*, 395 U.S. 943 (1969), even the language torn out of context by the petitioner (at p. 17) does not bestow the right to bring a "private action" upon persons not directly injured by reason of an antitrust violation (or *a fortiori*, as in the instant case, persons actually injured, if at all, only by other causes). *Perkins* v. *Standard Oil of Calif.*, 395 U.S. 642, 648-649) (1969) affirms the requirement of direct, rather than incidental, injury. The facts in this and petitioner's other Supreme Court authorities have no resemblance whatever to the instant facts, since in all of them plaintiff was clearly the person directly affected by the antitrust violation and his damages were not attributable to any common law breach.

C. This Court has uniformly denied certiorari in antitrust "standing" and other cases, despite the existence of "conflicts" between Circuits similar to, more important, and more likely to recur, than the conflict asserted here.

As regards the asserted conflict between the decision herein and a decision of the Court of Appeals for the Ninth Circuit in *Mulvey* v. *Samuel Goldwyn Productions*, 5 Trade Reg. Rep. (1970 Trade Cas.), ¶73,361 at 89,448 (9th Cir. October 20, 1970)—not only are the decisions distinguishable, but the conflict is not of such general importance as to warrant review by this Court.

First, *Mulvey* involved a direct sale of five pictures by plaintiff to defendant, with the sale price to be affected by the receipts realized from the subsequent distribution by defendant of the films. In the instant case, involving a licensing agreement providing for the payment of a percentage of the receipts to the producer, plaintiff was in the identical position of a patent owner who licenses his patent for royalties. Such a licensor has—as has been recently reiterated—no standing to sue for antitrust violations by his licensee affecting that licensee's customers and competitors. *SCM Corporation* v. *Radio Corporation of America*, 276 F. Supp. 373 (S.D.N.Y.), *aff'd*, 407 F.2d 166 (2nd Cir.), *cert. den.*, 395 U.S. 943 (1969).

Secondly, the court in *Mulvey* acknowledged that if there had been a contract and the damages had been caused by a breach of that contract "other than that constituting the antitrust violation," there would be no antitrust cause of action, 5 Trade Reg. Rep. (1970 Trade Cas.), at p. 89,449-50. That, as shown in Point A above, is precisely the case here.

Any conflict between these decisions clearly lacks the importance or dimensions which have uniformly been re-

quired for review by this Court. The two Circuit Courts did not differ in their views of the applicable antitrust principles of law, since the Ninth Circuit recognized both the target area and direct causation requirements. See also, *Conference of Studio Unions* v. *Loew's*, *supra*, p. 10. All that is actually involved here is the inference to be drawn from particular facts.

Furthermore, the conflict can affect few others than the litigants herein. *Fields* and *Mulvey* are the only decisions in private actions for television block booking since *United States* v. *Loew's*, *supra*, p. 9, in 1962. And, despite the continuous supervision of the Department of Justice, there has not been a single complaint by the Government based on such block booking. It is scarcely of national importance whether the courts below were correct in holding that this particular plaintiff, in an effort to treble his claim for damages, is "attempting to transform a claim for breach of contract into a treble damage antitrust action" (Petition, App. 4).

Moreover, the decision here sought to be reviewed follows an unusually long, cogent line of authorities in many Circuits, which deny standing to sue under similar circumstances—none, indeed, as convincing as the instant ones. In the majority of those cases, the plaintiff petitioned for certiorari and alleged similar conflicts with decisions in the Ninth as well as other Circuits, and these petitions were without exception denied.

For example, in *Harrison* v. *Paramount Pictures, Inc.*, 211 F.2d 405 (3rd Cir.), *cert. den.*, 348 U.S. 828 (1954) and *Melrose Realty Co.* v. *Loew's, Inc.*, 234 F.2d 518 (3rd Cir.), *cert. den.*, 352 U.S. 890 (1956), plaintiff, the owner of a motion picture theatre, charged its lessee, the oper-

ator of the theatre, with wilfully conspiring with motion picture distributors and competing theatres to split runs of motion pictures, to plaintiff's damage. These violations of the same statute as is here involved allegedly caused a decrease in the attendance in the theatre, thereby diminishing the percentage rentals paid to plaintiff under its lease, as well as an impairment in the value of the theatre. In both cases, judgment was granted in favor of the defendants on motion and affirmed by the Court of Appeals, on the ground that the plaintiff:

> " * * * is nonetheless not a 'person * * * injured in his business or property' within the meaning of section 4 of the Clayton Act, 15 U.S.C.A. §15, and, therefore, is not entitled to bring suit under the Act for an alleged conspiracy relating to the licensing of pictures at the theatre by the lessee-operator. * * * " (234 F. 2d at 519).

These decisions apply *a fortiori*, since there the plaintiff was the intended, and the *only*, victim who could claim any damage—the theatre operator having itself willingly participated and conspired in the antitrust violation. In the instant case, the persons directly affected by the alleged block booking, namely, the television stations and distributors of competing pictures, can sue therefor. Certainly—as observed by the Ninth Circuit Court of Appeals itself—it was not the intention of Congress to make "damages under the anti-trust law * * * available to those * * * who seek the windfall of treble damages because of incidental harm." *Conference of Studio Unions* v. *Loew's, Inc.*, *supra*, p. 10, at 54-55. Otherwise, "business men would be subjected to liabilities of indefinable scope for conduct already subject to drastic private remedies." *Snow Crest Beverages, Inc.* v. *Recipe Foods, Inc.*, 147 F. Supp. 907 (D. Mass. 1956).

If the decision herein were reversed, motion picture distributors would be subjected to a multiplicity of antitrust actions by any of the numerous persons who have percentage or other interests in the proceeds of most films (such as directors, actors and writers), seeking to treble the damages resulting from conduct fully reparable by non-statutory actions. Antitrust enforcement would be not fostered, but frustrated, through such a disregard of national guide-lines, and the normal conduct of competitive business would be hampered by trumped-up litigation.

In both the *Harrison* and *Melrose* cases, the plaintiff petitioned for certiorari, alleging "irreconcilable conflicts" in other circuits, including in *Melrose*, a contemporary decision in the Ninth Circuit. In both cases certiorari was denied.

In *Productive Inventions, Inc.* v. *Trico Products Corp.*, 224 F.2d 678 (2nd Cir.), *cert. den.*, 350 U.S. 936 (1956), a patentee was held to have "no standing under the antitrust laws to complain of the incidental loss of royalties" resulting from violations directed against its licensees' business (p. 680). Plaintiff petitioned for certiorari, asserting a direct conflict with the Ninth Circuit decision in *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955)—the principal authority cited in *Melvey*, and also heavily relied upon in the instant petition. This conflict was as sharp and direct as, and more important than, the conflict asserted here, but certiorari was denied.

In *Volasco Products Co.* v. *Lloyd A. Frey Roofing Co.*, 308 F.2d 383, 395, *cert. den.* 372 U.S. 907 (1963), the Court of Appeals for the Sixth Circuit held that " . . . a supplier is too remote and too far removed from the direct injury to recover damages resulting from violation of the antitrust laws directed against the supplier's customer [citing

numerous cases throughout the Circuits]." Plaintiff's petition for certiorari alleged a conflict between the Sixth Circuit and the decisions of this Court as well as the Tenth Circuit, but this Court, consistently with its practice in similar cases, denied the petition.

Only about a year ago, this Court denied certiorari in the strikingly pertinent case of *SCM Corporation* v. *Radio Corporation of America*, 407 F.2d 166 (2nd Cir.), *affirming* 276 F.Supp. 373 (S.D.N.Y.), *cert. den.*, 395 U.S. 943 (1969). There, Radio Corporation (RCA) alleged that its licensee, SCM, had violated the antitrust laws through unlawful monopolization, restrictions in the licensing of plaintiff's machines, and "*illegal 'tie-in' provisions* in such licenses," thus causing "direct injury" to RCA (276 F.Supp. at 375-76) (emphasis added). RCA's claim was dismissed for legal insufficiency on the same two grounds as in the instant case: that RCA was not within the " 'target area'," and that the injury to it was not "direct" but "incidental" (276 F.Supp. at 376; 407 F.2d at 169).

This decision again applies *a fortiori*, for two reasons: (1) whereas in *SCM* the District Judge held that the injury was "incidental" rather than "direct" (276 F.Supp. at 376), in the instant case the same District Judge (McLean), after citing *SCM*, indicated that here the "block booking could [not] have caused injury to plaintiff, incidental or not"; and (2) SCM's alleged antitrust violations, "by eliminating the licensees," put SCM "in a position vis-à-vis RCA where it [could] make its own demands with respect to the use of the patents" (407 F.2d at 172)—a direct consequence having no analogue in the instant case. Accordingly, there was a dissenting opinion in *SCM*, the rationale of which would not apply to the instant case, and the decision here was unanimous.

In its petition for certiorari, and subsequently in its petition for a rehearing of this Court's denial of certiorari, RCA cited, as "conflicting," most of the decisions cited in the instant petition (up through *Perkins* v. *Standard Oil Co.*, *supra*, p. 12), but both petitions were denied. There is no reason why this Court should now, one year later, take a contrary view of a decision which is even less questionable, in a matter less important and less recurrent than the one cited.

In *Conference of Studio Unions* v. *Loew's Inc.*, 193 F.2d at 54-55, which also limited antitrust recovery "to those who have been directly injured by the lessening of competition," certiorari was also denied, 342 U.S. 919 (1952).

In addition, this Court has repeatedly denied petitions for certiorari in other types of cases, involving direct and more significant and pervasive conflicts than the one here postulated. See for example, *United States* v. *Abrams*, 197 F.2d 803 (6th Cir.), *cert. den.*, 344 U.S. 855 (1952); *United States* v. *Community Services, Inc.*, 189 F.2d 421 (4th Cir.), *cert. den.*, 342 U.S. 932 (1952); *Sokol Bros. Furniture Co.* v. *Commissioner of Internal Revenue*, 185 F.2d 677 (5th Cir.), *cert. den.*, 340 U.S. 952 (1951); *Beal* v. *United States*, 182 F.2d 565 (6th Cir.), *cert. den.*, 340 U.S. 852 (1950); *Coplon* v. *United States*, 191 F.2d 749 (D.C. Cir.), *cert. den.*, 342 U.S. 926 (1952); *Arlington* v. *Mayer*, *cert. den.*, 339 U.S. 965 (1950) (no lower court opinion); *NLRB* v. *Sanson Hosiery Mills*, 195 F.2d 350 (5th Cir.), *cert. den.* 344 U.S. 863 (1952); *Zipp* v. *Commissioner*, 259 F.2d 119 (6th Cir.), *cert. den.*, 359 U.S. 934 (1959); *NLRB* v. *Southern Bleachery & Print Works, Inc.*, 257 F.2d 235 (4th Cir.), *cert. den.*, 359 U.S. 911 (1959); *Seven-Up Co.* v. *Blue Note, Inc.*, 260 F.2d 584 (7th Cir.), *cert. den.*, 359 U.S. 966 (1959); *Missouri Pac. R.R.* v. *H. Roux Co.*, 258 F.2d 445

(5th Cir.), *cert. den.*, 358 U.S. 929 (1959); *Delaware* v. *Curran*, 239 F.2d 707 (3d Cir.), *cert. den.*, 358 U.S. 948 (1958) and *Ferraiolo* v. *Newman*, 259 F.2d 342 (6th Cir.), *cert. den.*, 359 U.S. 927 (1959).

Moreover, none of the cases last cited was supported by a line of authorities even approaching, in uniformity and cogency, the authorities supporting the decision below, in which certiorari was so consistently denied. In the light of those details, the conflict here asserted is, surely, insignificant and insubstantial.

D. The decision below is manifestly correct, and is supported by consistent, overwhelming authority.

The numerous decisions throughout the Circuits which led inevitably to the decision here, and in which petitions for certiorari were uniformly denied, are set forth in Point C above. Point B demonstrates that the decision also follows from the decisions and reasoning of this Court, and Point A shows that this constitutes the strongest case for dismissal of all.

There are numerous other decisions which support the instant one, among which are the following:

> *Salerno* v. *American League of Professional Baseball Clubs*, 429 F.2d 1003 (2d Cir. 1970); *Lieberthal* v. *North County Lanes, Inc.*, 221 F. Supp. 685 (S.D.N.Y.) *aff'd*, 332 F.2d 269 (2nd Cir. 1964); *Bookout* v. *Schine Chain Theatres, Inc.*, 253 F.2d 292 (2nd Cir. 1958), (L. Hand, C.J.); *Loeb* v. *Eastman Kodak Co.*, 183 Fed. 704 (3rd Cir. 1910); *Miley* v. *John Hancock Mutual Life Insurance Co.*, 148 F. Supp. 299, 303 (D. Mass.), *aff'd* 242 F.2d 758 (1st Cir.) *cert. den.* 355 U.S. 828 (1957); *VTR, Inc.* v. *Goodyear Tire & Rubber Co.*, 303 F. Supp. 773 (S.D.N.Y. 1969); *Gerli* v. *Silk Ass'n of America*, 36 F.2d 959 (S.D.N.Y. 1929) (Thacher, D.J.).

Thus also, *Nationwide Auto Appraiser Serv., Inc.* v. *Association of Casualty and Surety Companies*, 382 F.2d 925, 929 (10th Cir. 1967), pointed out that "the directness rule" has been applied consistently since the enactment of the Clayton Act, and that:

> "If the times have changed, and the needs of business have changed to bring about a need to extend the right of recovery to others, Congress would have so indicated."

The language of Judge Wyzanski in *Snow Crest Beverages, Inc.* v. *Recipe Foods, Inc.*, 147 F. Supp. 907, 909 (D. Mass. 1956) is even more pointed:

> "It [Congress] seems to have been content for the judiciary to take a position narrower than that often applied in non-statutory tort cases and in cases where plaintiffs are not allowed a multiple recovery." (at 909).

CONCLUSION

For the reasons above set forth, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1062

FIELDS PRODUCTIONS, INC.,

Petitioner,

—against—

UNITED ARTISTS CORPORATION,

Respondent.

RESPONDENT'S REBUTTAL BRIEF

PAUL MARTINSON
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Counsel for Respondent

February 12, 1971

In The

Supreme Court of the United States

No. 1062

Fields Productions, Inc.,

Petitioner,

—against—

United Artists Corporation,

Respondent.

RESPONDENT'S REBUTTAL BRIEF

Preliminary Statement

Respondent has just been served with copies of "Petitioner's Supplemental Brief" and, in the event that that brief is considered by the Court, petitioner respectfully requests that the following rebuttal brief also be considered.

In view of the shortness of time, respondent is (at the suggestion of the Clerk of this Court) filing this brief in typewritten form.

The Footnote in *Mulvey v. Samuel Goldwyn Productions* and the Decision in *Wilson v. Ringsby Truck Lines*, to Which Petitioner Refers, Are Entirely Inapposite

In *Mulvey* v. *Samuel Goldwyn Productions* (Petitioner's Supp. Br., pp. 1-2), the Court of Appeals, Ninth Circuit, did not have before it—either on the appeal or the application for rehearing—a copy of the complaint in the instant

action or the particular facts herein, and it was not aware of the clear distinctions between *Mulvey* and the instant case, set forth in Respondent's Brief (pp. 13-14). The petition for rehearing there was predicated merely upon the fact that the court's opinion did not mention *Fields Productions, Inc.* v. *United Artists Corporation*. The fact remains—and the petitioner has been unable to controvert it—that the damage in the instant case was caused simply by an alleged breach of contract (for which an action is pending), whereas in *Mulvey* it was not (nor was any breach of contract claim even asserted).

This very distinction is recognized in the *Mulvey* opinion, which states that an antitrust action will not lie "when the breach consists of conduct other than that constituting the antitrust violation and when there is evidence that the non-antitrust wrong, not the antitrust violation, was the legal cause of the injury." (433 F.2d 1073, 1075). That is precisely the case here.

Consequently, the alleged conflict is not one of principle, but of the application of an established principle to different, and unique, sets of facts. Petitioner cannot contest respondent's demonstration that this asserted conflict "can affect few others than the litigants herein". (Resp. Br., p. 14). Moreover, the instant petition is uniquely unmeritorious, since the complaint here is insufficient for lack, not only of standing, but of causation.

The facts in *Wilson* v. *Ringsby Truck Lines, Inc.*, CCH 1971 Trade Cases, p. 89, 823, ¶ 72,441 (Petitioner's Supp. Br., pp. 2-3) have not the slightest resemblance hereto. Furthermore, the Court of Appeals in that Circuit, in *Nationwide Auto Appraiser Serv. Inc.* v. *Association of*

Casualty and Surety Companies, 382 F.2d 925, 929 (10th Cir. 1967), held that a franchisor, which receives percentage royalties from its franchise holders, may not—any more than a supplier or a licensor—recover damages resulting from antitrust violations directed against its franchise holders. (Please see also the quotation from that decision at page 20 of Respondent's Brief.)

Similarly, *Radovich* v. *National Football League*, 352 U.S. 445 (Petitioner's Supplemental Brief, page 3), upon which *Wilson* relied, is completely distinguished at page 12 of our principal brief.

CONCLUSION

The petitioner has failed to refute any of the respondent's reasons for denial of the writ.

Respectfully submitted,

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February 12, 1971

SUPREME COURT, U.S.
Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1970

No. 1082

FIELDS PRODUCTIONS, INC.,

Petitioner,

v.

UNITED ARTISTS CORPORATION,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF

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February 11, 1971

IN THE

Supreme Court of the United States

October Term, 1970

No. 1662

FIELDS PRODUCTIONS, INC.,

Petitioner,

v.

UNITED ARTISTS CORPORATION,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF

This brief is submitted to appraise the Court that after the filing of Fields' petition for certiorari and before the filing of United Artists' brief in opposition, the Ninth Circuit, on rehearing, modified its opinion in *Mulvey* v. *Samuel Goldwyn Productions* (petition, pp. 8-11) to add the following footnote:

> "We disagree with the contrary conclusion on the standing issue reached by the Second Circuit, per curiam, in Fields Productions, Inc. v. United Artists Corp. (1970) 432 F.2d 1010."

The opinion, as so modified, appears in the January 18, 1971 advance sheet, 433 F.2d 1073, 1076, and is not referred to in the opposing brief which was filed on February 3, 1971.

The Ninth Circuit has thus explicitly recognized the sharp conflict between itself and the Second Circuit over the proper application of Section 4 of the Clayton Act, 15 U.S.C. §15, asserted in the petition and disputed by United Artists, which now requires resolution by this Court.

One other recent decision, which appeared in the CCH Trade Regulation Reporter on January 25, 1971, demonstrated that the conflict is not limited in its significance and effect to the motion picture industry, as United Artists claims. *Wilson* v. *Ringsby Truck Lines Inc.*, CCH 1971 Trade Cases, p. 89,823, ¶73,441 (D. Colo., Dec. 21, 1970) makes it obvious, as does Judge Waterman's dissent in *Billy Baxter* v. *Coca-Cola Co.*, 431 F.2d 183, 189-196, 197 (2d Cir., 1970), *in which a petition for certiorari awaits decision by this Court*, that the principles by which standing is to be determined in antitrust cases are not at all clear, well settled or even reconcilable with decisions of this Court. In *Wilson*, the Court sustained an employee's standing to use for treble damages, by reason of a reduction of compensation alleged to have been caused by defendant's violation of the Sherman Act. In referring to the numerous precedents regarding standing in antitrust cases, the Chief District Judge said:

> "We must confess at the outset that we find antitrust standing cases more than a little confusing and certainly beyond our powers of reconciliation." (CCH 1971 Trade Cases, p. 89,824)

In *Wilson*, the Court also questioned whether "direct injury" or "target area" were proper restrictions to be imposed by Courts in construing Section 4 of the Clayton Act, 15 U.S.C. §15, and concluded:

> "The best evidence of what Congress intended ought to be the language of [15 U.S.C.] section 15 itself, and, as we have already noted, that section does not contain either a 'direct injury' or a 'target area' limitation upon standing. In addition, the Supreme Court's holding in *Radovich v. National Football League*, 352 U.S. 445 (1957), indicates that we should take an unrestrictive view of section 15." (CCH 1971 Trade Cases, p. 89,826)

After the quotation from *Radovich* (352 U.S., pp. 452-53), which also appears at pp. 18-19 of Fields' petition, the Court said:

> "This paragraph suggests to us that the Supreme Court would not take a restrictive view of [15 U.S.C.] section 15, and we do not believe that the tenth circuit court of appeals would do so on the facts of this case." (CCH 1971 Trade Cases, p. 89,826)

Thus, there can be no doubt that a sharp conflict exists between the Second and the Ninth and other Circuits and between the Second Circuit and this Court on the proper construction of Section 4 of the Clayton Act, 15 U.S.C. §15, as it affects standing to sue in any given antitrust case. It is respectfully submitted that the wide diversity of opinion and doubt that exists in all circuits requires resolution now by this Court. Such resolution will expedite and facilitate the proper course of pending and future litigation on the question of standing as it affects litigants in many

fields of commerce beyond, as well as in, the motion picture business.

Respectfully submitted,

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February 11, 1971